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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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DEC 12 1996

Federal Communications Commission
Office of Secretary

In the Matter of)
)
)

Rulemaking to Amend Parts 1, 2, 21, and 25)
of the Commission's Rules to Redesignate)
the 27.5-29.5 GHz Frequency Band, to)
Reallocate the 29.5-30.0 GHz Frequency)
Band, to Establish Rules and Policies for)
Local Multipoint Distribution Service and)
for Fixed Satellite Services)
)

CC Dkt. No. 92-297

**JOINT REPLY OF MICROWAVE SERVICES, INC.
AND DIGITAL SERVICES CORPORATION IN SUPPORT
OF PETITION FOR LIMITED RECONSIDERATION**

Microwave Services, Inc. ("MSI") and Digital Services Corporation ("DSC"),
by their attorneys, hereby submit this Joint Reply to the Opposition to Joint Petition for
Limited Reconsideration ("Opposition") filed by Teledesic Corporation ("Teledesic") on
December 2, 1996 in connection with the above-captioned proceeding.¹

A few facts -- as opposed to Teledesic's obfuscation and transparent attempts
to rewrite history -- are in order. First, no later than December 1993, Teledesic had legal
notice that various parties, including DSC, planned to operate in the DEMS band; that is

¹ Teledesic continues to refer to MSI and DSC as one company in order to create the
impression that there is a single DEMS applicant seeking to destroy Teledesic's
planned business. In fact, MSI, DSC, and others independently applied for DEMS
licenses in 1993, as interest in the 18 GHz band increased. More recently, MSI and
DSC began a cooperative effort to construct their respective licensed facilities to more
effectively serve the public. Teledesic's attempt to cast itself as an unknowing target
is designed to disguise the "bait and switch" that it perpetrated on both the Commis-
sion and DEMS operators.

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when public notice of DSC's applications was released.² Second, no later than June 1995 -- over one year before the adoption of the *28 GHz Order* -- Teledesic was corresponding with DSC to discuss the import of those applications.³ Third, whether Teledesic's failure to raise any concern regarding these applications until after the release of the *28 GHz Order* resulted from negligence or an intent to deceive, the consequences are the same and the burden falls entirely on Teledesic to justify its actions. Teledesic's Opposition, however, attempts to deflect these facts by variously charging DSC and MSI with a "stealth" application campaign, and the Commission with "random" licensing actions.

Teledesic's smokescreen arguments notwithstanding, the sole issue raised in MSI's and DSC's Petition for Limited Reconsideration is Teledesic's failure to stand by its representation that it could and would coordinate with Fixed Service ("FS") systems in the 18 GHz band. In light of Teledesic's sudden about-face regarding its ability to coordinate, the underlying premise of the Commission's co-primary designation for non-geostationary fixed satellite service ("NGSO/FSS") systems and FS systems in the 18 GHz band is flawed, and this limited portion of the *28 GHz Order* must be reconsidered.

² Attached as Exhibit 1 is a timeline showing that DSC's DEMS applications appeared in the Commission's Public Notices as early as 1993 and that MSI's and DSC's DEMS licenses were issued as early as January 1995.

³ See Exhibit 2 (Letter dated June 10, 1995, from Russ Daggatt to Dr. Raj Singh).

I. Teledesic Must Accept Responsibility for the Designation of NGSO/FSS as Co-Primary With DEMS in the 18 GHz Band

Teledesic tries to avoid scrutiny of its tactics by accusing DEMS operators -- and the Commission -- as if they are somehow responsible for the predicament that Teledesic alone has created. For instance, Teledesic repeats its now familiar canard that MSI and DSC pursued a "strategy of stealth" that involved "quietly collecting DEMS licenses in the 18 GHz band." ⁴ Teledesic also claims that MSI and DSC somehow "deliberately prevented the Commission from considering" the sharing issue during the 28 GHz proceeding.⁵ These claims are patently false.

The only party that deflected the Commission's attention from examining issues regarding sharing in the 18 GHz band was Teledesic. It did so by repeatedly asserting that it could share with 18 GHz terrestrial users. Had Teledesic hinted otherwise -- either in its application (which it was obligated to do) or in the instant proceeding -- MSI and DSC certainly would have petitioned to deny its application at the time it was filed and/or filed comments in the instant rulemaking. As the earlier applicants (now licensees), MSI and DSC would have been, as they are now, in a vastly superior legal position *vis-à-vis* Teledesic.

Of course Teledesic was aware of these facts, and hence its silence until after the *28 GHz Order* was released. Its repeated claim that the 174 applications for new nodal stations filed by MSI in August 1996 first drew its attention to DEMS⁶ is belied by its own

⁴ Teledesic Opposition at 5-6.

⁵ *Id.* at 5.

⁶ *Id.* at 6-7.

June 1995 correspondence with DSC.⁷ Moreover, these 174 applications were filed no more or less "quietly" than the roughly 125 initial DEMS applications that MSI, DSC and other applicants filed between October 1993 and July 1996 while Teledesic awaited issuance of the *28 GHz Order*.⁸ Teledesic's own actions prove that it purposely waited until after the *28 GHz Order* to oppose DEMS applications because it did not want to jeopardize its requested designation.

Thus, it is Teledesic that engaged in a "strategy of stealth" to obtain its requested designation in the 18 GHz band. Teledesic represented to the Commission and other licensees in its application that there was "no possibility of interference with" 18 GHz FS systems and that, in the event that an unforeseen problem arose, it could and would coordinate with such systems.⁹ Further, Teledesic consistently maintained this position throughout the entire 28 GHz proceeding, even as it corresponded with DEMS operators. Yet immediately after the *28 GHz Order* was released and Teledesic believed that its "right" to 500 MHz in the 18 GHz band was secure, Teledesic attacked DEMS operators and claimed for the first time that sharing and coordination with DEMS is impossible.

Perhaps because the undisputed chronology of events so exposes Teledesic's deceptive scheme, Teledesic also admonishes the Commission for essentially complying with

⁷ See Exhibit 1.

⁸ This includes 44 applications for new DEMS channels filed just one month *before* the release of the *28 GHz Order* which Teledesic did not oppose. Many of the 125 applications appear in the Commission's Public Notices *twice* -- once when they were accepted for filing and once when they were granted.

⁹ Teledesic Application at 79.

its own rules. Teledesic accuses the Commission of engaging in "random licensing activity" by continuing to process DEMS applications during the 28 GHz proceeding.¹⁰ Teledesic apparently assumed that all licensing of then-permitted services in the 18 GHz band would cease immediately upon its filing of an application for a satellite system that will not be operational (if at all) until the year 2003. Putting aside the fact that there is absolutely no precedent for such an assumption (and Teledesic cites to none), Teledesic's consistent representations that its proposed system is compatible with all 18 GHz FS systems, its failure to participate at all in the DEMS licensing process, and its failure to raise any 18 GHz downlink concerns in the 28 GHz proceeding gave the Commission no reason to expect Teledesic's ad hoc surprise attack on DEMS after the release of the *28 GHz Order*.

Teledesic's argument that routine DEMS licensing should have been subject to some type of policy review by the Commission cannot be taken seriously.¹¹ The Commission conducted a rulemaking proceeding and made a policy determination with respect to DEMS when the service was established in 1981. Moreover, Congress significantly reinforced the policy of encouraging facilities-based competition in the local exchange market in the Telecommunications Act of 1996, competition that will be greatly enhanced through DEMS systems. MSI's and DSC's DEMS systems are providing broadband, high-speed wireless telecommunications services in furtherance of these mandates and they will have *thousands of times* Teledesic's system capacity in a comparable market (using at most only 20% of the spectrum needed by Teledesic). Teledesic's various attempts to delay the deployment of

¹⁰ Teledesic Opposition at 12.

¹¹ *Id.* at 12.

these state-of-the-art DEMS systems is denying customers access to competitive local services that Congress and the Commission intended for them to receive.

II. Teledesic is Attempting to Intimidate the Commission Into Clearing the 18 GHz Band of Its Competitors

Teledesic advises the Commission that it would be "unwise" to reconsider any aspect of the *28 GHz Order* in light of the international allocation that was adopted at WRC-95 and the licensing delays for various systems that would occur.¹² Put simply, Teledesic's position is that the Commission, having been finessed by Teledesic's strategy of quiet deception into successfully championing Teledesic's cause at WRC-95, cannot now afford the international embarrassment of acknowledging that some of Teledesic's prior representations -- and, hence, some of the Commission's, which relied on Teledesic's representations -- were false. In furtherance of its position, Teledesic claims that "there is simply no way to unring this particular bell."¹³

If the Commission wishes to maintain the integrity of its processes, then the bell must be rung again. After all, it was Teledesic's representations that led the Commission to support Teledesic's proposals at WRC-95 and grant Teledesic's requested downlink designation.¹⁴ No doubt Teledesic's next maneuver will be to claim that its proposed system

¹² *Id.* at 11.

¹³ *Id.* at 14. If the Commission does not reconsider the NGSO/FSS designation, then at the very least it must reaffirm that no NGSO/FSS systems will be licensed that cannot share the 18 GHz band with all FS systems, including DEMS.

¹⁴ While the *28 GHz Order* did not add an allocation for NGSO/FSS systems in the 18 GHz band, the 28 GHz proceeding was the Commission's first consideration of the presence of commercial NGSO/FSS systems in the band and its impact on GSO/FSS and FS systems.

is not compatible with point-to-point 18 GHz FS systems as well. Allowing Teledesic, a mere applicant, to obtain a co-primary designation under false pretenses and then to proceed to clear the band of existing operators would be a perversion of the Commission's licensing process and a blatant violation of the rights of licensees.

The sole cause of any licensing delays is Teledesic's decision to wait until after the adoption of the *28 GHz Order* to claim incompatibility with DEMS. Contrary to Teledesic's assertion, MSI and DSC are not seeking to delay implementation of the *28 GHz Order* so they can offer their "thoughts on frequency use in the Ka-band."¹⁵ Rather, they merely seek to require Teledesic to demonstrate that it can do what it promised -- **coordinate with 18 GHz FS systems**. MSI and DSC have always believed, and continue to believe, that sharing issues in the 18 GHz band can be resolved in accordance with the *28 GHz Order* and the Commission's established frequency coordination rules.

III. Teledesic's Ability to Coexist With Other 18 GHz Users is Directly Relevant to the 28 GHz Proceeding

Finally, Teledesic argues that sharing issues between its proposed NGSO/FSS system and DEMS "have nothing to do with the Commission's redesignation of the 18.8-19.3 GHz band for NGSO FSS."¹⁶ In support of this preposterous assertion, Teledesic attempts to characterize the *28 GHz Order* as dealing only with the narrow issue of removing the GSO/FSS allocation from the band.¹⁷ At the same time, however, Teledesic acknowledges

¹⁵ Teledesic Opposition at 3.

¹⁶ *Id.* at 10.

¹⁷ *Id.* at 9.

that the Commission chartered a committee to consider "sharing among satellite and terrestrial services interested in the 28 GHz band and its paired downlink spectrum at 18 GHz," and relied on the committee's conclusions in adopting a comprehensive band plan for both the 28 GHz and 18 GHz bands.¹⁸ In its application, Teledesic raised the possibility of conflicts with respect to Local Multipoint Distribution Service ("LMDS") operations in the 28 GHz band,¹⁹ but it stated unambiguously that it could coordinate with FS systems in the 18 GHz band.²⁰

The Commission's 28 GHz Order directly addressed the issue of sharing between NGSO/FSS systems and FS systems in the 18 GHz band. Indeed, the Commission sought comment on "any . . . issues concerning *downlinks* that might affect the band segmentation plan," recognizing that downlinks could be designated on a non-conventional paired basis if necessary.²¹ Based on Teledesic's representations in its application and the record in the 28 GHz proceeding, the Commission granted Teledesic's requested designation in the 18 GHz band and held that (1) NGSO/FSS systems and FS systems would continue to share the 18 GHz band on a co-equal basis and that (2) traditional frequency coordination

¹⁸ *Id.* at 5.

¹⁹ Teledesic Application at 80.

²⁰ *Id.* at 79. Teledesic now claims that the feasibility of coordination with DEMS was not considered because DEMS systems were not operational at the time. *See* Teledesic Opposition at 6. Of course, neither was any affected satellite system or any LMDS system (save one, small-area system) operational during the 28 GHz proceeding. The Commission's traditional frequency coordination procedures, however, require that applicants coordinate with both existing users *and* with previously filed applicants. *See, e.g.*, 47 C.F.R. § 21.203(c); 47 C.F.R. § 101.101(d).

²¹ 28 GHz Order at ¶ 75. As discussed above, Teledesic supported the proposal to designate the 18.8-19.3 GHz band for its downlink operations without expressing any concern about coordination with FS systems. *See* Comments filed by Teledesic in CC Dkt. No. 92-297 at 21 (filed Sept. 7, 1995).

procedures would continue to apply.²² Thus, the Commission considered sharing and coordination issues with FS systems and made an express, affirmative determination to retain its established rules and procedures.

Teledesic's revisionist history of the 28 GHz proceeding is merely its latest attempt to rewrite the *28 GHz Order* more to its liking. Rather than engaging in frequency coordination with 18 GHz users, Teledesic has disavowed its earlier promise to coordinate and is now claiming that the sharing and coordination issues resolved by the Commission in the 28 GHz proceeding is impossible.²³ If, as Teledesic now claims, it is unable to comply with the sharing and coordination requirements of the *28 GHz Order*, then the underlying foundation for its requested NGSO/FSS designation in the 18 GHz is eviscerated. The Commission's only appropriate response is to remove the requested designation until it is proven that NGSO/FSS systems are compatible with 18 GHz FS systems, including DEMS.

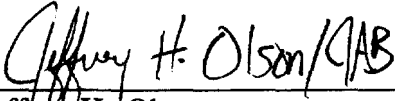
²² *Id.* at ¶ 79 n.138. Not only did the Commission specifically acknowledge the fact that DEMS is licensed in the 18 GHz band, but it also recognized that "there will be constraints imposed on NGSO/FSS subscriber terminals by fixed services" in the 18 GHz band. *Id.* at ¶ 79. Thus, the Commission explicitly recognized that applicants in each service would have to coordinate around first-in-time licensees and applicants in the other service.

²³ Teledesic Opposition at 14-15.


Conclusion

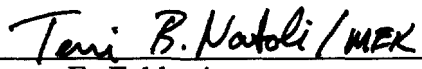
For the foregoing reasons, the Commission should grant MSI's and DSC's Petition for Limited Reconsideration and remove the co-primary designation for NGSO/FSS downlinks in the 18 GHz band.

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Dated: December 12, 1996

Exhibit 1

Timeline of DEMS and NGSO/FSS Licensing

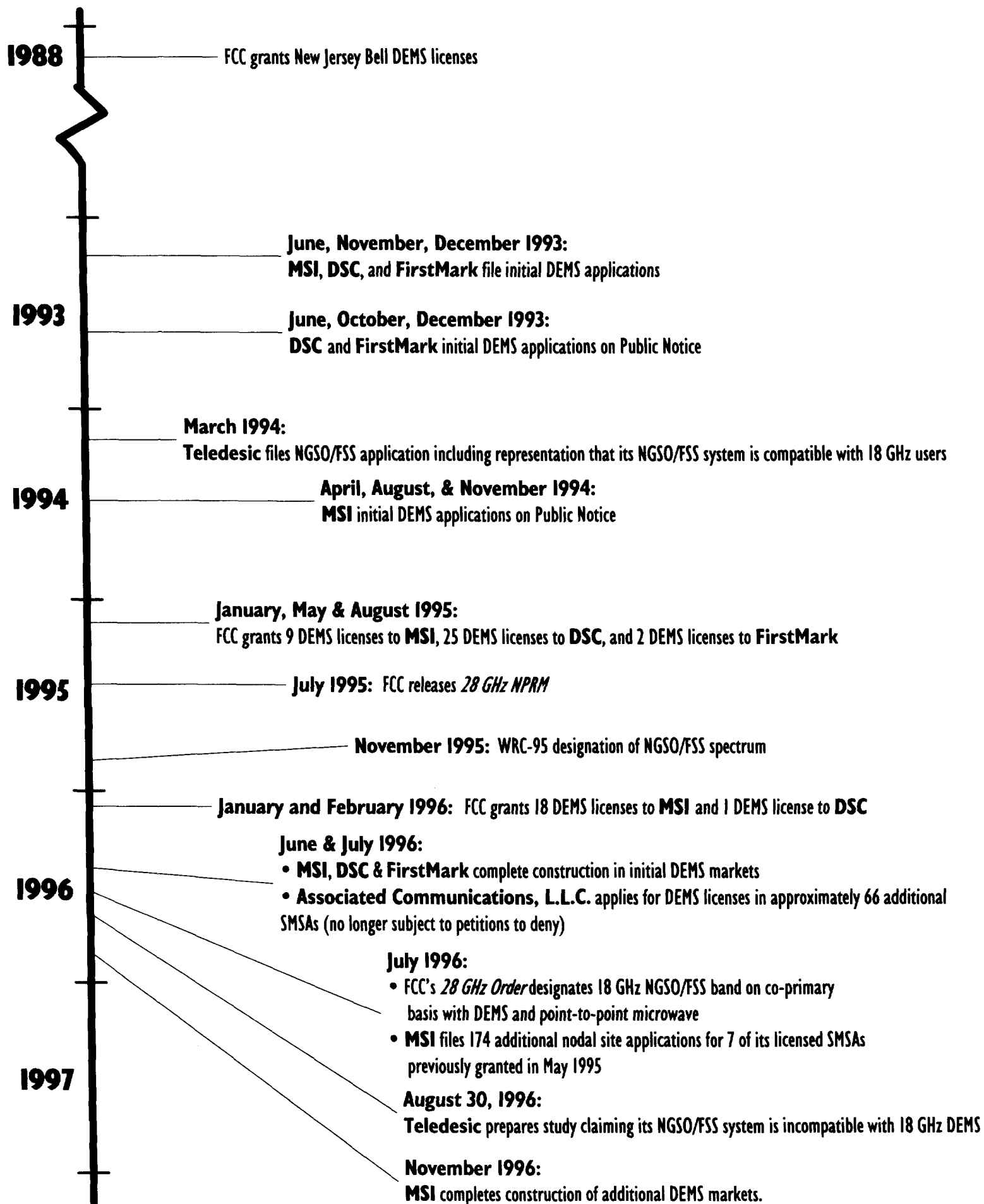


Exhibit 2



2300 Carillon Point, Kirkland, WA 98033 - Tel: 206-803-1400 - Fax: 206-803-1404

TO: Raj Singh
FROM: Russ Daggatt
DATE: 20 June 1995
FAX NO.: 703-243-4960
NO. OF PAGES: 7 (including cover)

Dear Raj:

Following up on our recent breakfast in D.C.:

1) Following is an internal memo on fixed services overlapping with our downlink frequencies (18.8 - 19.3 GHz). Which of these are the ones in which you have an interest? It might be helpful if you or your colleagues could coordinate with some of our folks on what interference issues, if any, might be implicit in this. Any other guidance you could provide would be greatly appreciated.

2) Current plans call for Mike Synar (U.S. Ambassador to WRC 95) to be in New Delhi on July 28. Ideally, we would both be with him in New Delhi on that day. It would be great if we could also set up a meeting with Reliance at the same time. Please let me know if this works with your schedule.

I don't know if you caught the news but the FCC voted out its report for WRC 95 which fully comprehended Teledesic's needs. A significant milepost for us. Now we have to sell that position internationally.

Cheers.

A handwritten signature, likely of Russ Daggatt, consisting of a large, stylized 'R' followed by a horizontal line.

CERTIFICATE OF SERVICE

I, Sally Watts certify that a copy of the foregoing
"Joint Reply of Microwave Services, Inc. and Digital Services
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was mailed, first-class postage prepaid, this 12th day of
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